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In the Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F., PETITIONER

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Individuals with Disabilities Education Act provides federal funds to States that agree to make available a "free appropriate public education" (FAPE) to every eligible child with a disability. 20 U.S.C. 1401(9), 1412(a)(1)(A). The question presented is whether the "educational benefit" provided by a school district must be "merely * * * more than *de minimis*" in order to satisfy the FAPE requirement. Pet. App. 16a (citations and internal quotation marks omitted).

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INTEREST OF THE UNITED STATES

This case involves the core requirement of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, that States receiving special-education grants from the federal government make available a "free appropriate public education" to eligible children with disabilities. 20 U.S.C. 1401(9), 1412(a)(1)(A). The United States has a substantial interest in ensuring that IDEA funds are spent in a manner consistent with that statute. In addition, the Department of Education is responsible for administering the IDEA and has promulgated regulations and policy guidance regarding its implementation. 20 U.S.C. 1406(a) and (d)-(f), 1417(a)(1); see 34 C.F.R. Pt. 300. At this Court's invitation, the United States

filed a brief at the petition stage urging the Court to grant certiorari and vacate the decision below.

STATEMENT

This case requires the Court to determine the degree of educational benefit that States must provide to eligible children with disabilities under the IDEA. The court of appeals held that the IDEA is satisfied so long as schools offer such children educational benefits that are "merely * * * more than *de minimis*." Pet. App. 16a (citations and internal quotation marks omitted). Applying that standard, the court rejected petitioner's claim that respondent had deprived him of his rights under the IDEA. *Id.* at 25a-26a, 36a, 49a, 51a.

1. The IDEA (formerly known as the Education of the Handicapped Act) provides federal grants to States "to assist them to provide special education and related services to children with disabilities." 20 U.S.C. 1411(a)(1). The statute's stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A).

The IDEA achieves that purpose by establishing an "enforceable substantive right to public education." *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Specifically, the IDEA requires States receiving IDEA funds to make a "free appropriate public education" (FAPE) available to every eligible child with a disability residing in the State. 20 U.S.C. 1412(a)(1)(A). The FAPE requirement embodies Congress's "ambitious objective"

of promoting educational opportunities for such children. *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985) (*Burlington*). The proper interpretation of that requirement is the subject of the question presented in this case.

a. The IDEA defines FAPE to mean "special education and related services" that

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of [Title 20 of the United States Code].

20 U.S.C. 1401(9).

The IDEA defines the "special education" component of the FAPE requirement as "specially designed instruction * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29). The Department of Education has promulgated regulations defining "specially designed instruction" to mean "adapting" educational methods to "address the unique needs of the child that result from the child's disability" and to help the child "meet the educational standards * * * that apply to all children." 34 C.F.R. 300.39(b)(3) (emphasis omitted).

The "individualized education program" (IEP) referenced in Subsection (D) of the FAPE definition is

the "centerpiece" of the IDEA's scheme for providing children with disabilities with a FAPE. *Honig*, 484 U.S. at 311; see 20 U.S.C. 1401(9)(D). An IEP must comply with specific statutory requirements and establish a special education program tailored to each child's "unique needs." 20 U.S.C. 1401(29); see 20 U.S.C. 1401(9)(D), 1414(d)(1)(A); 34 C.F.R. 300.22, 300.34, 300.39, and 300.320.

In *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982) (*Rowley*), this Court held that an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207. Although the Court declined "to establish any one test" for assessing the "adequacy" of such benefits, it made clear that the FAPE requirement obligates States to provide each eligible child with "access" to education that is "*meaningful.*" *Id.* at 192, 200, 202 (emphasis added).

b. The IDEA requires school districts to work collaboratively with parents to formulate the IEP for each child with a disability.[1] But Congress anticipated that this process would not always produce a consensus, and it established procedures by which parents can seek administrative and judicial review of a school district's IDEA-related determinations. See 20 U.S.C. 1415(f)-(j); *Burlington*, 471 U.S. at 368-369.

If parents are unable to resolve a dispute with their school district, they may obtain "an impartial due process hearing" before a state or local educational agency. 20 U.S.C. 1415(f)(1)(A) and (B); see 20 U.S.C. 1415(b)(6) and (7). The losing party may then seek

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[1] See, *e.g.*, 20 U.S.C. 1400(d)(1)(B), 1414(b)(2)(A), (d)(1)(B)(i), (d)(3)(A)(ii), (d)(3)(D), (d)(4)(A)(ii)(III), and (e), 1415(b)(1), (3)-(5), and (f)(3)(E)(ii)(II).

judicial review of a final administrative decision in either state or federal district court. 20 U.S.C. 1415(i)(2)(A). In adjudicating the case, the court must give "due weight" to the result of the state administrative proceedings. *Rowley*, 458 U.S. at 206.

2. Petitioner Endrew F. is a child with attention-deficit/hyperactivity disorder and autism. Pet. App. 3a. Petitioner's autism "affects his cognitive functioning, language and reading skills, and his social and adaptive abilities," including his ability to communicate his needs and emotions. *Ibid.*; see *id.* at 28a. As a child with autism, petitioner is eligible for a special education program under the IDEA. 20 U.S.C. 1401(3); Br. in Opp. 1; Pet. 6.

Petitioner attended public school in respondent Douglas County School District from preschool through fourth grade. Pet. App. 3a-4a. Pursuant to the IDEA, he received a special education program through an IEP for each school year. *Id.* at 4a. In May 2010, petitioner's parents withdrew him from the public school system following a dispute with respondent over the content of his fifth-grade IEP. *Id.* at 3a-4a, 15a; Br. in Opp. 2. Petitioner's parents enrolled petitioner in a private school, where he has made "academic, social and behavioral progress." Pet. App. 29a.

In 2012, petitioner filed a due-process IDEA complaint with the Colorado Department of Education. Pet. App. 59a. The complaint asserted that respondent had denied him a FAPE within the public school system. *Id.* at 4a, 60a. Petitioner sought reimbursement for his private-school tuition. *Id.* at 4a; see 20 U.S.C. 1412(a)(10)(C)(ii) (authorizing reimbursement as remedy for FAPE violation); *Burlington*, 471 U.S.

at 369. A Colorado hearing officer conducted a three-day hearing and ruled in respondent's favor, concluding that petitioner had "made some academic progress" while enrolled in respondent's public school system. Pet. App. 84a-85a; see *id.* at 59a-85a.

3. Petitioner sued respondent under the IDEA in federal district court, claiming that respondent had denied him a FAPE. Pet. App. 4a. That court upheld the hearing officer's decision. *Id.* at 27a-58a. The court held that the IDEA requires States to provide only "some educational benefit." *Id.* at 36a. Based on evidence that petitioner had made "at the least, minimal progress" in public school, *id.* at 49a, the court concluded that petitioner had received all the Act requires, *id.* at 51a.

4. The Tenth Circuit affirmed. Pet. App. 1a-26a. It interpreted *Rowley* to hold that the IDEA requires States to provide "some educational benefit" that "must *merely be more than de minimis.*" *Id.* at 16a (emphasis added; citations and internal quotation marks omitted). The court concluded that respondent's IEP for petitioner was adequate under that minimal standard. *Id.* at 23a. The court acknowledged, however, that even under the "merely * * * more than *de minimis*" test, "[t]his is without question a close case." *Id.* at 17a, 23a.

SUMMARY OF ARGUMENT

The Tenth Circuit rejected petitioner's claim based on its view that States can comply with the IDEA by providing educational benefits that are "merely * * * more than *de minimis.*" Pet. App. 16a (citations and internal quotation marks omitted). That holding is wrong. The IDEA requires States to give eligible children with disabilities an opportunity to make sig-

nificant educational progress, taking account of the child's unique circumstances. This Court should vacate the decision below and remand the case for application of the correct standard.

A. This Court first interpreted the FAPE requirement in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982). There, the Court recognized that the IDEA guarantees children with disabilities an enforceable, substantive right to an appropriate education. *Id.* at 200-204, 206-207. The Court declined to establish a bright-line test defining the content of the substantive FAPE requirement. *Id.* at 202. But it did explain that States must provide each eligible child with "meaningful" access to education. *Id.* at 192.

Rowley's "meaningful" access requirement is most sensibly understood to obligate States to offer each eligible child an opportunity to make significant educational progress, in light of his particular needs and capabilities. 458 U.S. at 192. Without the opportunity to make such progress, access to education cannot be "meaningful" under any reasonable understanding of that term. That conclusion is strongly reinforced by *Rowley*'s statement that a child in the general education classroom must receive an IEP that is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 204.

B. A requirement of significant educational progress is also the standard that is most consistent with the text, structure, and purpose of the IDEA. As a textual matter, Congress obligated participating States to provide eligible children an education that is "*appropriate.*" 20 U.S.C. 1412(a)(1)(A) (emphasis added). The IDEA's IEP provisions expressly require

schools to assess each child's capabilities, identify ambitious goals, develop a detailed plan to achieve those goals, and use measurement tools to assess progress along the way. See 20 U.S.C. 1414(d). Those elaborate procedures make sense only if Congress envisioned an "appropriate" education as one giving such children an opportunity to make significant educational progress.

The IDEA's stated purposes confirm that conclusion. Congress was explicit that the IDEA would set "high expectations" for children with disabilities and "prepare" them "for further education, employment, and independent living." 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A). Those goals would not be attainable unless a child is entitled to an opportunity for significant educational progress. Congress's sustained legislative engagement with respect to the IDEA over the past two decades, with its increased emphasis on educational achievement, provides further support for a robust significant educational opportunity standard. So do the Department of Education's regulations and guidance, which require schools to give all children with disabilities the opportunity to make appropriate progress toward mastering the knowledge and skills addressed in the same general curriculum taught to other children.

C. The significant progress standard is entirely workable. Schools can satisfy the FAPE requirement by assessing each child's needs and capabilities on an individualized basis, and then making reasonable educational judgments about the educational services that will help the child make significant progress toward attaining the goals identified by Congress. The significant educational progress standard is not a

license for courts to micromanage the reasonable judgments of educators or State hearing officers.

D. Whatever else the Court says about the substantive content of the FAPE requirement, it should reject the Tenth Circuit's "merely * * * more than *de minimis*" test. That test conflicts with the IDEA's mandate that States provide an education that is "appropriate." 20 U.S.C. 1412(a)(1)(A). No reasonable parent or teacher would think a child has received an "appropriate" education simply because he has received some benefit—however small—that is just barely more than trivial.

The Tenth Circuit's standard is also at odds with the IDEA's structure and purpose. Requiring only non-trivial progress is not consistent with the robust IEP-development process mandated by Congress. Nor does it square with Congress's stated goals. It is hard to imagine a legal standard that more directly contradicts Congress's purpose of embracing "high expectations"—and rejecting "low expectations"—than one that requires schools to provide educational benefits that are "merely * * * more than *de minimis*." 20 U.S.C. 1400(c)(4) and (5)(A).

ARGUMENT

THE IDEA REQUIRES STATES TO ENSURE THAT ELIGIBLE CHILDREN WITH DISABILITIES HAVE THE OPPORTUNITY TO MAKE SIGNIFICANT EDUCATIONAL PROGRESS

This Court's decision in *Board of Education of the Hendrick Hudson Central School District* v. *Rowley*, 458 U.S. 176 (1982), is best read as establishing that the IDEA requires States to give eligible children with disabilities the opportunity to make significant educational progress in light of a child's capabilities

and potential. The text, structure, purpose, and history of the IDEA all support that interpretation.

The significant educational progress standard is ambitious, but realistic. For students who are fully integrated into the regular classroom, that standard generally requires school districts to offer eligible students an opportunity to master grade-level content. For other students, that standard requires schools to enable eligible children to make progress that is appropriate in light of their own particular needs and capabilities. But the core requirement of significant educational progress remains. Because the lower courts applied the wrong legal standard, this Court should vacate the decision below and remand the case for further proceedings.[2]

A. *Rowley*'s Holding That Access To Education Must Be "Meaningful" Requires An Opportunity For Children To Make Significant Educational Progress

In *Rowley*, this Court addressed whether—and to what extent—the IDEA provides children with disabilities an enforceable substantive right to a FAPE. The Court chose not to define the precise contours of that right. 458 U.S. at 202. Nonetheless, the Court made clear that the IDEA obligates States to provide eligible children with substantive educational benefits that are sufficient to make their "access" to education "meaningful." *Id.* at 192. Taken as a whole, *Rowley* is most sensibly understood to require States to provide

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[2] This brief uses the term "significant educational progress" to refer not only to a child's academic progress, but also to progress with respect to aspects of the child's functional development (behavioral, physical, emotional, etc.) that are—or should be—addressed in his IEP. See, *e.g.*, 20 U.S.C. 1400(c)(5), 1401(26)(a) and (34), 1414(d)(1)(A)(i)(I), (II), (VIII), and (3)(A)(iv).

children with the opportunity to make significant educational progress, in light of each child's unique circumstances.

1. The plaintiff in *Rowley* was a girl with a hearing impairment, Amy Rowley, whose parents wanted her school to provide "a qualified sign-language interpreter in all her academic classes." 458 U.S. at 184. Amy's IEP instead gave her other accommodations, including use of an FM hearing aid and eight hours of instruction each week from a tutor and speech therapist. *Ibid.* Amy was an "excellent" lipreader, and she thrived in elementary school even without the interpreter's assistance. *Ibid.* In particular, Amy was "remarkably well-adjusted"; she was able to "interact[] and communicate[] well with her classmates; she developed "an extraordinary rapport" with her teachers; and she was "achieving educationally, academically, and socially." *Id.* at 185 (citations omitted) (summarizing district court findings). Most notably, Amy "perform[ed] better than the average child in her class" and was "advancing easily from grade to grade." *Id.* at 185, 210 (citations omitted).

Amy sued her school district under the IDEA, alleging that the school's refusal to provide the sign-language interpreter denied her a FAPE. The district court ruled in her favor, holding that the FAPE requirement imposes a substantive obligation on States to provide each eligible child with "an opportunity to achieve [his or her] full potential commensurate with the opportunity provided to other children." *Rowley*, 458 U.S. at 185-186 (citation omitted). The Second Circuit affirmed that interpretation of the FAPE standard, and Amy defended it in this Court. *Ibid.*; see generally *id.* at 187-204 & n.26; U.S. Amicus Br. at

12-23, *Rowley*, *supra* (No. 80-1002) (largely endorsing district court's analysis).

The school district's primary argument for reversal was that the IDEA "did not create substantive individual rights to free appropriate public education," and that the FAPE requirement was merely an aspirational "goal." Pet. Br. at 28, 41, *Rowley*, *supra* (No. 80-1002). The district further argued that federal jurisdiction in IDEA cases is limited to assessing whether a school district has complied with the IDEA's procedural requirements. *Id.* at 33, 51.

2. The *Rowley* Court ultimately concluded that the school district had not violated the IDEA—and that Amy had obtained a FAPE—because Amy was receiving "substantial specialized instruction and related services," "performing above average in the regular classrooms" of her school, and "advancing easily from grade to grade." 458 U.S. at 202, 210 (citation omitted). In doing so, however, the Court rejected both parties' interpretations of the FAPE requirement.

Most fundamentally, the Court rejected the school district's argument that the IDEA does not create any individual, substantive right to a FAPE that is enforceable in court. *Rowley*, 458 U.S. at 200-204, 206-207. As the Court explained, courts analyzing an alleged FAPE violation must conduct a "twofold" inquiry. *Id.* at 206. "First," they must determine whether the State has "complied with the procedures" set forth in the IDEA. *Ibid.* "And second," courts must determine whether the child's IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-207. The Court made clear

that the IDEA is satisfied only if *both* requirements—procedural *and* substantive—are met. *Id.* at 207.[3]

3. As to the content of the IDEA's substantive requirement, the *Rowley* Court acknowledged that the statutory text does not explicitly set forth "any substantive standard prescribing the level of education to be accorded handicapped children." 458 U.S. at 189. But the Court also concluded that "[i]mplicit in the congressional purpose of providing access to a [FAPE] is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *Id.* at 200. The Court therefore held that the IDEA provides a "basic floor of opportunity" that requires States to provide access to special education and related services "which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201.

The Court ultimately stated that it would not "attempt today to establish any one test for determining the [substantive] adequacy of educational benefits conferred upon all children by the Act." *Rowley*, 458 U.S. at 202. Nonetheless, the Court laid down three important markers that shed light on the content and application of the substantive FAPE standard.

First, the Court rejected Amy's argument that States must provide educational benefits sufficient to "maximize the potential of each handicapped child commensurate with the opportunity provided non-

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[3] This Court has since repeatedly cited *Rowley* for the proposition that the IDEA grants an "enforceable substantive right to public education" to eligible children with disabilities. *Honig* v. *Doe*, 484 U.S. 305, 310 (1988); see *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 531-532 (2007); *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984).

handicapped children." *Rowley*, 458 U.S. at 200; see *id.* at 197 n.21. It explained that Congress did not intend to achieve such "strict equality of opportunity or services," and it described the standard embraced by the lower courts as "unworkable" insofar as it required "impossible measurements and comparisons" between different children with different needs and abilities. *Id.* at 198.

Second, the Court made clear that the "substantive educational standard" embodied in the FAPE requirement ensures that each eligible child's "access" to public education is "*meaningful.*" *Rowley*, 458 U.S. at 192 (emphasis added); see *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66, 73 (1999) (emphasizing *Rowley*'s "meaningful" access requirement); *Irving Indep. Sch. Dist.* v. *Tatro*, 468 U.S. 883, 891 (1984) (same). The Court later elaborated on that standard, noting that "if the child is being educated in the regular classrooms of the public school system," the child's IEP "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204.

Third, the Court indicated that compliance with the FAPE requirement as to any individual child turns on a case-specific analysis of that child's unique needs and capabilities. The Court emphasized the "infinite variations" in the capabilities of different children with different disabilities, and it noted that "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end." *Rowley*, 458 U.S. at 202.

4. *Rowley*'s recognition that States must provide "meaningful" access to education is sensibly interpreted to require them to give eligible children the

opportunity to make significant educational progress. After all, *access to* education is only a means to obtaining the *benefits of* education. Access will only be meaningful if the benefit that results from that access is also meaningful.

In addition, standard dictionaries establish that "meaningful" and "significant" are synonyms.[4] When they are used to modify a phrase such as "access to public education," *Rowley*, 458 U.S. at 192, both adjectives make clear that the quality and degree of such access must be sufficient to allow the child to make important educational gains. *Rowley*'s statement that the IDEA requires "meaningful" access to education is thus best read as another way of saying that States must give children the opportunity to make significant educational progress.

That interpretation of *Rowley* is further supported by the Court's separate observation that the IEP for a child who is educated "in the regular classrooms of the public school system" should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. at 204.[5] That observation both confirms that the IDEA generally requires significant educational progress, and pro-

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[4] See, *e.g.*, *Merriam-Webster's Collegiate Dictionary* 769 (11th ed. 2003) (defining "meaningful" as "significant") (capitalization altered); 9 *The Oxford English Dictionary* 522 (2d ed. 1989) ("[f]ull of meaning" or "significant"); *Random House Webster's Unabridged Dictionary* 1191 (2d ed. 1998) ("full of meaning, significance, purpose, or value"); see also *The New Oxford American Dictionary* 1052 (2d ed. 2005) ("having a serious, important, or useful quality or purpose").

[5] The Court emphasized that the mere fact that a child advances from grade to grade does not necessarily establish that he has received a FAPE. *Rowley*, 458 U.S. at 203 n.25.

vides more concrete guidance on what that standard entails for eligible students who have the capacity to master grade-level content.

While *Rowley* does not provide comparable concrete guidance on what the IDEA requires for students who cannot be fully integrated into the general education classroom, it nonetheless makes clear that significant progress is also required for those children. Such children are subject to the same FAPE requirement, and they are therefore also entitled to "meaningful"—*i.e.*, significant—educational progress. The educational programs that these children receive will of course vary based on their particular disabilities and capabilities. Some children may be so far behind grade level in certain academic areas that significant educational progress will entail mastering the skills that are a necessary prerequisite for grade-level instruction. Others may have disabilities that are so severe that significant educational progress will entail specialized services geared toward learning more basic skills. See pp. 26-27, *infra* (providing examples). In all circumstances, however, *Rowley* requires States to implement an IEP that is reasonably calculated to enable the child to make progress that is significant in light of his own unique circumstances.

B. The IDEA Itself Confirms That States Must Offer Eligible Students The Opportunity To Make Significant Educational Progress

Even apart from *Rowley*, the text, structure, purpose, and history of the IDEA establish that States must give eligible children the opportunity to make significant educational progress.

1. The core textual command of the IDEA's FAPE requirement is that States make available to eligible

children a public education that is "*appropriate*." 20 U.S.C. 1412(a)(1)(A) (requiring States to provide a "free *appropriate* public education") (emphasis added); see 20 U.S.C. 1401(9)(C) (defining FAPE to require "an appropriate preschool, elementary school, or secondary school education in the State involved"). Standard dictionaries define "appropriate" to mean "specially suitable," "fit," or "proper," *Webster's Third New International Dictionary* 106 (1993) (*Webster's Third*) (capitalization altered), or "suitable or proper in the circumstances," *The New Oxford American Dictionary* 76 (2d ed. 2005) (*New Oxford*).

This Court has explained that "appropriate" is "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015) (citation omitted). Precisely which factors are relevant turns on the particular statutory context in which that term arises. See *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369 (1985) (holding that what constitutes "appropriate" relief in IDEA district court action must be determined "in light of the purpose of the [IDEA]"); see also, *e.g.*, *Sossamon* v. *Texas*, 563 U.S. 277, 286-287 (2011) (looking to statutory context and purpose to determine what relief is "appropriate" under 42 U.S.C. 2000cc-2(a)); *West* v. *Gibson*, 527 U.S. 212, 217-218 (1999) (holding that the meaning of "appropriate" depends on statutory context). Here, the text, purpose, and history of the IDEA establish that an education is "appropriate" when it provides the child with an opportunity to make significant progress in light of his capabilities.

2. The IDEA provisions describing the IEP development process envision that schools will offer children with disabilities the opportunity to make significant progress. See 20 U.S.C. 1414(d). Section 1414(d)(1)(A)(i)(I) first requires schools to assess "the child's present levels of academic achievement and functional performance," including "how the child's disability affects the child's involvement and progress in the general education curriculum." See 20 U.S.C. 1414(d)(3)(A). Section 1414(d)(1)(A)(i)(II) then requires schools to develop a clear statement of "measurable annual goals"—"including academic and functional goals"—in light of the child's needs and abilities. Those goals must be designed both (1) to "meet the child's needs that result from the child's disability to enable the child to * * * make progress in the general education curriculum," and (2) to "meet each of the child's other educational needs that result from the child's disability." 20 U.S.C. 1414(d)(1)(A)(i)(II).

The annual IEP goals are not merely hortatory: Schools must both describe how they will measure "the child's progress toward meeting" those academic and functional goals and establish a mechanism for providing parents with "periodic reports on th[at] progress." 20 U.S.C. 1414(d)(1)(A)(i)(III). Schools must also set forth, in detail, the way in which they will deliver special education and related services to ensure that the child is able to (1) "advance appropriately toward attaining the annual goals," (2) "be involved in and make progress in the general education curriculum," (3) "participate in extracurricular and other nonacademic activities," and (4) "be educated and participate with other children with disabilities and nondisabled children" in the activities described

in the IEP. 20 U.S.C. 1414(d)(1)(A)(i)(IV). And when a child exhibits a "lack of expected progress toward the annual goals and in the general curriculum," the IDEA requires schools to revise the IEP "as appropriate" to address the deficiency. 20 U.S.C. 1414(d)(4)(A)(ii).

Section 1414(d)'s IEP provisions provide clear insight into what level of education Congress has deemed "appropriate" for purposes of the FAPE requirement. See 20 U.S.C. 1401(9)(D) (requiring a FAPE to be "provided in conformity with the [IEP] required under [S]ection 1414(d)"). Congress would not have established procedures that are so elaborate and robust unless it intended to guarantee eligible children an opportunity to make significant educational progress in light of their respective capabilities.

3. Congress's stated purposes also support a significant educational progress standard. See *Forest Grove Sch. Dist.* v. *T. A.*, 557 U.S. 230, 239-245 (2009) (emphasizing that IDEA must be interpreted in light of its "remedial purpose"); see also *Burlington*, 471 U.S. at 369 (looking to IDEA's "purpose" in determining what constitutes "appropriate" IDEA relief).

Congress expressly stated that the IDEA's "purposes" include "ensur[ing] the effectiveness of[] efforts to educate children with disabilities" and providing such children with a FAPE that will "meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A) and (4). It further explained that the IDEA is targeted to "[i]mproving educational results for children with disabilities" and thereby helping to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency" for

such individuals. 20 U.S.C. 1400(c)(1); see 20 U.S.C. 1412(a)(2) (requiring State goals to include "providing full educational opportunity to all children with disabilities"). Congress also emphasized the importance of setting "high expectations"—and avoiding "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those purposes—all codified in the statutory text—reflect Congress's goal of ensuring that eligible children with disabilities have the opportunity to make significant educational progress at school. Without such progress, those children would be unable to attain further education, employment, or economic self-sufficiency. And denying them the chance to make such progress would undermine the goal of equal opportunity and ratify the "low expectations" that Congress unambiguously rejected. 20 U.S.C. 1400(c)(4).

4. Interpreting the IDEA to require an opportunity for significant educational progress is also consistent with Congress's repeated engagement with the IDEA over the past two decades. In 1982, the *Rowley* Court held that States must provide eligible children with "meaningful" access to education. 458 U.S. at 192. In 1997 and 2004, Congress twice enacted major legislation reauthorizing and modifying the IDEA in ways that reflect Congress's overarching desire to expand the educational rights of children with disabilities. See Individuals with Disabilities Education Improvement Act of 2004 (2004 IDEA Amendments), Pub. L. No. 108-446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997 (1997 IDEA Amendments), Pub. L. No. 105-17, 111 Stat. 37; see generally Pet. Br. 6-8.

Among other changes, the 1997 and 2004 IDEA Amendments established many of the findings, purposes, and IEP requirements discussed at length above.[6] By those changes, Congress sought "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Forest Grove*, 557 U.S. at 239. (quoting S. Rep. No. 17, 105th Cong., 1st Sess. 3 (1997)); see S. Rep. No. 185, 108th Cong., 1st Sess. 1-2 (2003) (2003 Senate Report) (noting that purpose of amendments was to "strengthen implementation" of the IDEA, "shift the IDEA from a compliance-driven model to a performance-driven model," and generally "improv[e] the quality of education for children with disabilities"). As Congress itself indicated in both 1997 and 2004, its overriding goal was to replace "low expectations" with "high expectations."[7]

In addition, Congress has also aligned the IDEA with the substantial reform and accountability measures adopted in the Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 6301 *et seq.*, as amended by the No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 15 Stat. 1425, and the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, 129 Stat. 1802. Congress amended the

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[6] See 2004 IDEA Amendments, §§ 601(c)(5)(A) and (d)(1)(A), 614(d)(1)(A)(i)(II) and (III), 118 Stat. 2649, 2651, 2708 (revising what is now 20 U.S.C. 1400(c)(5)(A) and (d)(1)(A), 1414(d)(1)(A)(i)(II) and (III)); 1997 IDEA Amendments, §§ 601(c)(1), (d)(1)(A) and (4), 614(d)(1)(A) and (4), 111 Stat. 38, 42, 83, 87 (revising what is now 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4)(A), 1414(d)(1)(A) and (4)(A)); see generally pp. 18-20, *supra*.

[7] 2004 IDEA Amendments, § 601(c)(4) and (5)(A), 118 Stat. 2649; 1997 IDEA Amendments § 601(c)(4) and (5)(A), 111 Stat. 39.

IDEA—in 2004 and again in 2015—to establish "goals for the performance of children with disabilities" that "are the same as the State's long-term goals and measurements of interim progress for children with disabilities" under the ESEA. 20 U.S.C. 1412(a)(15)(A)(ii); see 20 U.S.C. 1412(a)(15)(B) (requiring States to "establish[] performance indicators" to assess such progress).

Congress's decision to link the IDEA to the ESEA is significant because the ESEA requires States to adopt "challenging academic content standards and aligned academic achievement standards" for *all* students in public schools—including children with disabilities. 20 U.S.C. 6311(b)(1); see 34 C.F.R. 200.1(a)-(c); see also 20 U.S.C. 6311(b)(1)(D)(i) (requiring those standards to be "aligned with the entrance requirements" for State's public colleges and universities). Separate standards can apply to children classified as having the most significant cognitive disabilities under certain circumstances, but only insofar as they "reflect professional judgment as to the highest possible standards achievable" by those children. 20 U.S.C. 6311(b)(1)(E)(i)(III); 34 C.F.R. 200.1(d).

The ESEA also requires States to carry out regular assessments measuring student progress under the applicable standards, and to establish "ambitious * * * long-term goals" for "improved * * * academic achievement" and high-school graduation rates. 20 U.S.C. 6311(b)(2) and (c)(4)(A). By linking the IDEA to the ESEA's accountability measures, Congress established a "unified system of accountability" to promote its purpose of "ensur[ing] that all children"—"including children with disabilities"—"are held to

high academic achievement standards." 2003 Senate Report 17-18.

Congress's repeated amendments to the IDEA in recent decades shed light on what counts as an "appropriate" education for purposes of the FAPE requirement. See *West*, 527 U.S. at 217-218 (holding that meaning of "appropriate" in 42 U.S.C. 2000e-16(b) is not "fr[o]ze[n]" in time and is properly informed by subsequent statutory amendments). At every step, Congress has reaffirmed and deepened its commitment to enhancing the substantive educational benefits available to children with disabilities. The IDEA's historical evolution thus confirms that an "appropriate" education is one that is reasonably calculated to allow a child with a disability to make significant educational progress.

5. Finally, requiring significant educational progress also comports with the Department of Education regulations implementing the IDEA. See *Rowley*, 458 U.S. at 186 n.8 (indicating that IDEA regulations are relevant source of "guidance" with respect to the FAPE requirement). Because the Department of Education is charged with enforcing the IDEA, its regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See 20 U.S.C. 1406 (authorizing such regulations).

As noted above, the IDEA defines FAPE to include "special education," which includes "*specially designed instruction* * * * to meet the unique needs of a child with a disability." 20 U.S.C. 1401(29) (emphasis added). The Department of Education regulations define "specially designed instruction" to mean "adapting, as appropriate to the needs of an eligible child * * * , the content, methodology, or delivery of

instruction" so as "(i) [t]o address the unique needs of the child that result from the child's disability," and "(ii) [t]o ensure access of the child to the general curriculum, *so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.*" 34 C.F.R. 300.39(b)(3) (emphasis added).

Consistent with that regulation, the Department of Education has explained that it expects IEP goals to be "aligned with grade-level [academic] content standards for all children with disabilities." U.S. Dep't of Educ., Dear Colleague Letter 1 (Nov. 16, 2015), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf. At the same time, the Department has emphasized that such alignment does not replace the individualized decisionmaking required in the IEP process. *Id.* at 4. A school must therefore determine—on an "individualized" basis—how much progress toward grade-level standards a particular child can reasonably be expected to make each year, considering (among other factors) (1) the impact of the child's "specific disability," (2) the "special education instruction that has been provided to the child," (3) the child's "previous rate of academic growth," and (4) "whether the child is on track to achieve grade-level proficiency within the year." *Ibid.*

Ultimately, the Department has declared that "an IEP team should determine annual goals that are *ambitious* but *achievable*." Dear Colleague Letter 5 (emphasis added). That interpretation of the FAPE requirement tracks Congress's intent and supports the significant educational progress standard.

C. A Significant Educational Progress Standard Is Workable And Respects The Reasonable Judgment Of Schools And Hearing Officers

The IDEA's significant educational progress standard is readily administrable, and it pays due regard to the judgments of educational experts.

1. Requiring States to provide children with an opportunity to make significant educational progress does not impose a rigid, one-size-fits-all test that unduly restrains the discretion of educators. On the contrary, the standard is flexible and individualized, and it promotes the sort of commonsense educational judgments that schools and teachers generally make—with respect to all of their students—every day.

As explained above, the IDEA's robust procedural provisions require schools designing an IEP to meet with the child's parents, consider the child's unique needs and capabilities, determine what special education and related services will help the child learn, develop appropriate goals, and measure progress. See pp. 4, 18-19, *supra*. The significant educational progress standard protects children with disabilities by ensuring that the IEP development process is not an empty formality, but rather produces an educational plan that will actually advance Congress's goal of meaningfully enhancing the lives and opportunities of such children.

Schools must ultimately ensure that each child's IEP is tailored to his needs and reasonably calculated to provide him with an opportunity to make significant progress. The degree of progress that is required in each instance must reflect both (1) a fair assessment of the child's capabilities and potential, and (2) the

IDEA's overarching goals of preparing children with disabilities for "further education, employment, and independent living." 20 U.S.C. 1400(d)(1)(A).

Notably, the significant educational progress standard does not require States to "maximize each child's potential" or "achieve strict equality of opportunity or services." *Rowley*, 458 U.S. at 198 (rejecting these goals). But it does promote "high expectations" for children with disabilities—and it avoids "low expectations"—just as Congress intended. 20 U.S.C. 1400(c)(4) and (5)(A).

2. The straightforward and commonsense approach described above will undoubtedly result in different IEPs for different children with different capabilities. See *Rowley*, 458 U.S. at 202 (noting "infinite variations" in the educational benefits obtainable by such children). For example, a child with impaired vision may require special instruction in Braille, along with appropriately modified classroom materials, in order for her to be educated in the general education classroom and participate fully in the general education curriculum. See 20 U.S.C. 1414(d)(3)(B)(iii). For that child, significant educational progress might mean that she is able to attain the same degree of learning and academic achievement that is typical of her non-disabled classmates, such that she will "achieve passing marks," "advance from grade to grade," and eventually be in a position to pursue higher education. *Rowley*, 458 U.S. at 204.

Significant educational progress could mean something different, however, for a child whose learning disability leads him to read at four grade levels below his class peers. In that circumstance, the IEP team might reasonably conclude that an appropriate goal is

to close the reading gap by two levels through specialized reading instruction, while permitting the child to access some curricular content through a combination of audio text books and other electronic resources. Dear Colleague Letter 4-5 (offering similar example). That child could thereby receive a FAPE, even if the significant progress that he makes in reading still leaves him two levels behind his classmates at the end of the year.

Finally, a child with significant cognitive and other disabilities may need to receive much of his instruction outside of the general education classroom. Depending on the circumstances, significant progress for that student might encompass mastery of basic life skills—such as self-care, socialization, basic reading, and functional math (for example, counting money and telling time)—that could eventually enable the child to work and live independently.

In each of those cases, the hypothesized IEP reflects a reasonable determination—made by educators—of the degree of progress that the particular child can make in light of his particular disability and capability. In each case, that progress helps the child to master knowledge and develop essential skills, thereby advancing the underlying purposes of the IDEA. See 20 U.S.C. 1400(d)(1)(A) (noting Congress's goals of meeting "unique needs" of eligible children and preparing them for "further education, employment, and independent living").

3. The IDEA ensures that schools have the primary responsibility for consulting with parents and determining the degree of "ambitious but achievable" progress that is appropriate for each child with a disability. Dear Colleague Letter 5; see generally

pp. 3-4, 18-19, *supra*. In most cases, schools and parents will reach consensus on an IEP that is reasonably calculated to help the child learn and succeed. When schools and parents disagree, State hearing officers can adjudicate disputes and ensure that the IEP in fact provides the child with the opportunity to make significant progress. See pp. 4-5, *supra*.

In the relatively small number of IDEA cases that result in litigation, courts must grant "due weight" to the child-specific determinations made by hearing officers, *Rowley*, 458 U.S. at 206, and they should also respectfully consider the on-the-ground judgments of teachers and school administrators, see generally 20 U.S.C. 1414(d)(1)(B). The purpose of judicial review is not to have courts "impos[e] their view of preferable educational methods upon the States." *Rowley*, 458 U.S. at 207. Rather, its purpose is to ensure that the State decisionmakers have exercised reasonable educational judgment in concluding that a particular IEP will enable significant educational progress for the particular child at issue. Both the substantive FAPE standard and the standard of review respect the expertise of State educational officials, while also protecting the educational rights of children with disabilities.

D. The Tenth Circuit's "Merely * * * More Than *De Minimis*" Standard Is Erroneous

For the reasons explained above, the IDEA's FAPE requirement obligates States to give children with disabilities the opportunity to make significant educational progress. But even if the Court disagrees with that articulation of the substantive standard, one thing should be clear: The Tenth Circuit's "merely * * * more than *de minimis*" rule is wrong. Pet.

App. 16a (citations and internal quotation marks omitted). That standard is not consistent with the IDEA's text or purpose, and it harms children with disabilities by saddling them with low expectations in their most formative years. Whatever else the Court says about FAPE, it should hold that barely-more-than-trivial progress is not sufficient.

1. a. The Tenth Circuit's standard does not square with the IDEA's requirement that the education provided be "appropriate." 20 U.S.C. 1401(9)(C), 1412(a)(1)(A). As noted above, the ordinary meaning of "appropriate" is "specially suitable," "fit," or "proper," *Webster's Third* 106 (capitalization altered), or "suitable or proper in the circumstances," *New Oxford* 76.

The "merely * * * more than *de minimis*" test is incompatible with that ordinary meaning. No parent or educator in America would say that a child has received an "appropriate" or a "specially suitable" or "proper" education "in the circumstances" when all the child has received are benefits that are barely more than trivial. That is especially true when a child is capable of achieving much more.[8]

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[8] Respondent is wrong to argue (Supp. Br. in Opp. 10) that giving any substantive content to the word "appropriate" violates *Rowley*. To be sure, *Rowley* rejected the argument that the term "appropriate" is a "term of art which concisely expresses" the "potential-maximizing" interpretation embraced by the lower courts in that case. 458 U.S. at 197 n.21. But the Court expressly recognized that "appropriate" has both substantive *and* procedural components. *Ibid.* ("Congress used the word ["appropriate"] as much to describe the settings in which handicapped children should be educated *as to prescribe the substantive content* or supportive services of their education.") (emphasis added); see generally *id.* at 206-207 (requiring "twofold" substantive/

b. Three examples illustrate how the Tenth Circuit's "merely * * * more than de *minimis*" test violates the textual requirement that States provide an "appropriate" education.

First, consider a fourth-grader with cognitive disabilities who receives specialized educational programming for the first two months of the school year, during which she makes excellent progress. The school then cuts off the specialized services entirely, and she makes no additional progress for the remainder of the year. That child will undoubtedly have received *some* degree of more-than-trivial educational benefit during the short time she received specialized services. Under the Tenth Circuit's "merely * * * more than de *minimis*" test, that benefit would presumably satisfy the FAPE requirement. But no reasonable person would say that she received an "appropriate" education in any real sense of that word. 20 U.S.C. 1412(a)(1)(A).

Next imagine a middle-schooler whose autism results in both (1) a deficiency in his ability to read at grade level, and (2) a near-total inability to communicate with his peers in a school setting. For years, the school provides the child with specialized instruction to address the reading deficiency, but it does absolutely nothing to help the child improve his communication skills. The Tenth Circuit's standard would appear to be satisfied if the child makes any non-trivial improvement in reading—even though the school has ignored his communication problems and left him

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procedural FAPE inquiry). And the Court nowhere stated or implied that courts should ignore the term "appropriate" when conducting the FAPE inquiry in future cases.

entirely unprepared to succeed in high school and beyond.

Finally, consider a child who has a hearing impairment and requires assistive technology (such as an amplification device) in order to understand her teachers' instruction. See 20 U.S.C. 1401(1), 1414(d)(3)(B)(iv) and (v). If the child successfully employs the device in her social studies class—but her teachers refuse to use it in her math, reading, and science classes—the child may well make progress on her IEP goals in social studies, even while attaining no educational benefit whatsoever in any other subject.

In that circumstance, it would be absurd to describe the child's overall education as being "appropriate" for that child. Yet, under the "merely * * * more than *de minimis*" test, the child would nonetheless have received a FAPE. Notably, respondent does not deny that the Tenth Circuit would consider the FAPE requirement to be satisfied in these circumstances. See Supp. Br. in Opp. 10-11 (discussing this hypothetical). That concession lays bare the entirely illusory substantive protection offered by the Tenth Circuit's approach.

2. The IDEA's structure also undermines the "merely * * * more than *de minimis*" standard. As discussed in detail above, the IDEA makes clear that the IEP must be carefully tailored to the particular needs and abilities of each child, see 20 U.S.C. 1414(d)(1)(A)(i)(I), and it requires a clear statement of "measurable annual goals" in light of those needs and abilities, 20 U.S.C. 1414(d)(1)(A)(i)(II). Section 1414(d) also requires special education and related services to enable each child "to advance appropriately to-

ward attaining th[os]e annual goals." 20 U.S.C. 1414(d)(1)(A)(i)(IV); see pp. 18-19, *supra*.

Section 1414(d)'s description of the IEP requirements cannot be reconciled with the Tenth Circuit's approach. Congress would not have instructed States to develop each child's IEP with such a clear focus on promoting measureable annual progress—gauged in light of the particular needs and capabilities of each child—if all it wanted to require was that States provide some degree of educational benefit that is barely more than trivial.

3. Nor is the Tenth Circuit's standard consistent with Congress's purposes. As stated in the IDEA itself, those purposes include (1) "ensur[ing] the effectiveness" of education for children with disabilities; (2) "[i]mproving educational results for [such] children"; (3) promoting "equality of opportunity, full participation," and "economic self-sufficiency"; and (4) meeting the "unique needs" of children with disabilities and "prepar[ing] them for further education, employment, and independent living." 20 U.S.C. 1400(c)(1), (d)(1)(A), and (4). Congress also emphasized the need to set "high expectations"—and avoid "low expectations"—for children with disabilities. 20 U.S.C. 1400(c)(4) and (5)(A).

Those statements of congressional intent are not consistent with the Tenth Circuit's minimalist interpretation of the FAPE requirement. Indeed, if school districts provide benefits that are barely more than *de minimis*, it would be nearly impossible to accomplish Congress's stated goals. No reasonable school district sets out to provide educational benefits to its nondisabled children that are barely more than trivial. Providing children with disabilities such limited bene-

fits would therefore deprive them of any semblance of "equality of opportunity." 20 U.S.C. 1400(c)(1). And if the school provides benefits that are just above *de minimis*, it is hard to imagine that disabled children will be prepared for "further education, employment, and independent living" or "economic self-sufficiency." 20 U.S.C. 1400(d)(1)(A). Rather than promote "high expectations," the Tenth Circuit's standard expressly *lowers* expectations. 20 U.S.C. 1400(c)(5).

4. Neither the Tenth Circuit nor respondent have offered a persuasive explanation of how the "merely * * * more than de *minimis*" rule comports with the IDEA's text, structure, or history. The court of appeals appeared to believe that this standard is compelled by *Rowley*, and respondent relied heavily on *Rowley* in defending that rule at the certiorari stage. Both are mistaken: *Rowley* offers no support for the Tenth Circuit's standard, and in fact the decision affirmatively undermines that court's approach.

a. Respondent and the Tenth Circuit emphasize *Rowley*'s statement that the IDEA requires States to provide children with "*some* educational benefit," 458 U.S. 200 (emphasis added), and they appear to conclude that the Court's use of the word "some" means that anything more than nothing (or its legal equivalent of *de minimis*) is sufficient. That is not a reasonable interpretation of what the *Rowley* Court meant.

Most importantly, the Court was explicit that States must provide children with disabilities "access" to education that is "meaningful." *Rowley*, 458 U.S. at 192. As explained above, such access is "meaningful" only if it gives children the opportunity to obtain benefits—or to make progress—that is meaningful. See pp. 14-16, *supra*.

The Court also expressly stated that when a child "is being educated in the regular classrooms of the public educational system," the child's IEP must be calculated to "*enable the child to achieve passing marks and advance from grade to grade.*" *Rowley*, 458 U.S. 204 (emphasis added). The Court's explanation of how the FAPE requirement would apply in that circumstance makes clear that providing an educational benefit that is "merely * * * more than *de minimis*" does not suffice.

Respondent suggests that *Rowley*'s "meaningful" access requirement embraces no substantive standard at all, and merely requires compliance with the IDEA's procedural provisions. Supp. Br. in Opp. 8 ("Together, the IDEA's procedural requirements ensure that a child's 'access to public education' is 'meaningful.'") (quoting *Rowley*, 458 U.S. at 192). But that contradicts the very sentence in which the "meaningful" access requirement appears. 458 U.S. at 192. In that sentence, the Court expressly referred to the "meaningful" access requirement as a "*substantive educational standard.*" *Ibid.* (emphasis added). Respondent's interpretation of *Rowley* makes sense only if the language of that decision is ignored.

b. The Tenth Circuit's test also cannot be reconciled with *Rowley*'s emphasis on the "dramatically" different capabilities of different children with different disabilities. 458 U.S. at 202. *Rowley* cited those different capabilities in explaining why it was declining "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Ibid.* The Tenth Circuit's test focuses only on whether the child has attained some degree of non-trivial benefit, and it does

not require any consideration of how that benefit compares to the child's capabilities and potential. In doing so, the test departs from the child-specific analysis envisioned by *Rowley*.

Curiously, respondent agrees (Supp. Br. in Opp. 11) that "[a]n IEP's substantive adequacy" must "always [be] gauged in relation to *individualized* goals based on an *individualized* assessment of a student's needs." But respondent fails to explain how a "merely * * * more than *de minimis*" standard is actually consistent with that individualized approach. By its terms, the Tenth Circuit's test requires a binary inquiry into whether the child has been offered anything more than the legal equivalent of nothing. If so, then the FAPE requirement is automatically satisfied—regardless of whether the child is capable of achieving a lot more, a little more, or something in between. That sort of lowest-common-denominator, one-size-fits-all approach is not what Congress intended when it guaranteed eligible children the right to an "appropriate" education.

5. This Court's interpretation of the FAPE requirement will have practical, everyday consequences for the approximately 6.7 million children with disabilities who are covered by the IDEA.[9] The FAPE requirement is the statutory mandate "most fundamental" to the IDEA. *Winkelman* v. *Parma City Sch. Dist.*, 550 U.S. 516, 530 (2007). If school districts are told that the IDEA only requires them to provide eligible children with educational benefits that are

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[9] U.S. Dep't of Educ., *38th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2016* 250, http://www2.ed.gov/about/reports/annual/osep/2016/parts-b-c/index.html#download.

"merely * * * more than *de minimis*"—*i.e.*, if they are told that it is perfectly fine to aim low—they are less likely to offer the same educational opportunities than if they are told that they must give such children a chance to make significant progress.

As a practical matter, the legal standard will thus shape the conduct and choices of educators and parents when developing IEPs for children with disabilities. It will also guide hearing officers and courts adjudicating disputes between parents and schools, because the "[t]he adequacy of the [child's] educational program is" typically the "central issue" in IDEA litigation. *Winkelman*, 550 U.S. at 532; see 20 U.S.C. 1415(f)(3)(E).

The central role played by the FAPE requirement in the IDEA's scheme makes it especially important for this Court to reject the Tenth Circuit's "merely * * * more than *de minimis*" standard. That standard is—on its face—antithetical to Congress's goal of raising expectations for such children. For the reasons set forth above, the best way to vindicate the IDEA's text and purpose is to require schools to provide eligible children with an opportunity to make significant educational progress.

CONCLUSION

The court of appeals' decision should be vacated and the case should be remanded for assessment under the correct standard.

Respectfully submitted.

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APPENDIX

1. 20 U.S.C. 1400 provides:

Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and

unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with misla-

beling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

2. 20 U.S.C. 1401 provides in pertinent part:

Definitions

Except as otherwise provided, in this chapter:

* * * * *

(3) Child with a disability

(A) In general

The term "child with a disability" means a child—

(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

3. 20 U.S.C. 1406 provides:

Requirements for prescribing regulations

(a) In general

In carrying out the provisions of this chapter, the Secretary shall issue regulations under this chapter only to the extent that such regulations are necessary to ensure that there is compliance with the specific requirements of this chapter.

(b) Protections provided to children

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that—

(1) violates or contradicts any provision of this chapter; or

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects

the clear and unequivocal intent of Congress in legislation.

(c) Public comment period

The Secretary shall provide a public comment period of not less than 75 days on any regulation proposed under subchapter II or subchapter III on which an opportunity for public comment is otherwise required by law.

(d) Policy letters and statements

The Secretary may not issue policy letters or other statements (including letters or statements regarding issues of national significance) that—

(1) violate or contradict any provision of this chapter; or

(2) establish a rule that is required for compliance with, and eligibility under, this chapter without following the requirements of section 553 of title 5.

(e) Explanation and assurances

Any written response by the Secretary under subsection (d) regarding a policy, question, or interpretation under subchapter II shall include an explanation in the written response that—

(1) such response is provided as informal guidance and is not legally binding;

(2) when required, such response is issued in compliance with the requirements of section 553 of title 5; and

(3) such response represents the interpretation by the Department of Education of the applicable

statutory or regulatory requirements in the context of the specific facts presented.

(f) Correspondence from Department of Education describing interpretations of this chapter

(1) In general

The Secretary shall, on a quarterly basis, publish in the Federal Register, and widely disseminate to interested entities through various additional forms of communication, a list of correspondence from the Department of Education received by individuals during the previous quarter that describes the interpretations of the Department of Education of this chapter or the regulations implemented pursuant to this chapter.

(2) Additional information

For each item of correspondence published in a list under paragraph (1), the Secretary shall—

(A) identify the topic addressed by the correspondence and shall include such other summary information as the Secretary determines to be appropriate; and

(B) ensure that all such correspondence is issued, where applicable, in compliance with the requirements of section 553 of title 5.

4. 20 U.S.C. 1412(a) provides*:

State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

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* As amended by the Every Student Succeeds Act (2015) (ESSA), Pub. L. No. 114-95, §§ 9214(d)(2)(A), (B), and (C), 9215(ss)(3)(A)(i), (ii), (B)(i), and (ii), 129 Stat. 2164-2165, 2182.

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

(I) were not actually identified as being a child with a disability under section 1401 of this title; or

(II) did not have an individualized education program under this subchapter.

(C) State flexibility

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

(2) Full educational opportunity goal

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disa-

bilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the

use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

(ii) Assurance

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the pur-

poses of evaluation and placement of children with disabilities for services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

(8) Confidentiality

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

(9) Transition from subchapter III to preschool programs

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition plan-

ning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find

process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation

The child find process shall be designed to ensure the equitable participation of pa-

rentally placed private school children with disabilities and an accurate count of such children.

(III) Activities

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written affirmation

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance

(I) In general

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of equitable services

(I) Directly or through contracts

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological

Special education and related services provided to parentally placed private school children with disabilities, including mate-

rials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agen-

cies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that—

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency—

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in

subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency

(i) In general

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsi-

bility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

(ii) Reimbursement for services by public agency

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to

the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule

The requirements of subparagraph (A) may be met through—

(i) State statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

(13) Procedural requirements relating to local educational agency eligibility

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Personnel qualifications

(A) In general

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and

trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

(B) Related services personnel and paraprofessionals

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that—

(i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

(C) Qualifications for special education teachers

The qualifications described in subparagraph (A) shall ensure that each person employed as a

special education teacher in the State who teaches elementary school, middle school, or secondary school—

(i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;

(ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and

(iii) holds at least a bachelor's degree..[1]

(D) Policy

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special ed-

[1] So in original.

ucation and related services under this subchapter to children with disabilities.

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

(15) Performance goals and indicators

The State--

(A) has established goals for the performance of children with disabilities in the State that—

(i) promote the purposes of this chapter, as stated in section 1400(d) of this title;

(ii) are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;

(iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and

(iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

(16) Participation in assessments

(A) In general

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

(B) Accommodation guidelines

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

(C) Alternate assessments

(i) In general

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.

(ii) Requirements for alternate assessments

The guidelines under clause (i) shall provide for alternate assessments that—

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

(iii) Conduct of alternate assessments

The State conducts the alternate assessments described in this subparagraph.

(D) Reports

The State educational agency (or, in the case of a districtwide assessment, the local education-

al agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

(E) Universal design

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and ad-

ministering any assessments under this paragraph.

(17) Supplementation of State, local, and other Federal funds

(A) Expenditures

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

(B) Prohibition against commingling

Funds paid to a State under this subchapter will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(18) Maintenance of State financial support

(A) In general

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

(D) Subsequent years

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(19) Public participation

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(20) Rule of construction

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

(21) State advisory panel

(A) In general

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and

related services for children with disabilities in the State.

(B) Membership

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including—

(i) parents of children with disabilities (ages birth through 26);

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;

(x) a representative from the State child welfare agency responsible for foster care; and

(xi) representatives from the State juvenile and adult corrections agencies.

(C) Special rule

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

(D) Duties

The advisory panel shall—

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates

(A) In general

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

(23) Access to instructional materials

(A) In general

The State adopts the National Instructional Materials Accessibility Standard for the purpos-

es of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

(B) Rights of State educational agency

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

(C) Preparation and delivery of files

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to—

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instruc-

tional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

(D) Assistive technology

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

(E) Definitions

In this paragraph:

(i) National Instructional Materials Access Center

The term "National Instructional Materials Access Center" means the center established pursuant to section 1474(e) of this title.

(ii) National Instructional Materials Accessibility Standard

The term "National Instructional Materials Accessibility Standard" has the meaning given the term in section 1474(e)(3)(A) of this title.

(iii) Specialized formats

The term "specialized formats" has the meaning given the term in section 1474(e)(3)(D) of this title.

(24) Overidentification and disproportionality

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

(25) Prohibition on mandatory medication

(A) In general

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

(B) Rule of construction

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).

5. 20 U.S.C. 1414 provides in pertinent part*:

Evaluations, eligibility determinations, individualized education programs, and educational placements

* * * * *

(b) Evaluation procedures

(1) Notice

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

(i) whether the child is a child with a disability; and

(ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

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* As amended by the ESSA, Pub. L. No. 114-95, § 9215(ss)(5), 129 Stat. 2182.

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;

(iii) are used for purposes for which the assessments or measures are valid and reliable;

(iv) are administered by trained and knowledgeable personnel; and

(v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(4) Determination of eligibility and educational need

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

(6) Specific learning disabilities

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based interven-

tion as a part of the evaluation procedures described in paragraphs (2) and (3).

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

(ii) Rule of construction

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results,

who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into

the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP Team transition

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and

the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts

(i) In general

(I) Transfer within the same State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency

shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf

or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP Team meetings

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

(5) Multi-year IEP demonstration

(A) Pilot program

(i) Purpose

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

(ii) Authorization

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

(iii) Proposal

(I) In general

A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

(II) Content

The proposal shall include—

(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

(B) Report

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

(C) Definition

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from ele-

mentary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

(6) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

(7) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).

(ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections[1] 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

(f) Alternative means of meeting participation

When conducting IEP team[2] meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

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[1] So in original. Probably should be "section".

[2] So in original. Probably should be capitalized.

6. 20 U.S.C. 1415(i) provides:

Procedural safeguards

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

7. 20 U.S.C. 6311 provides in pertinent part*:

State plans

(a) Filing for grants

(1) In general

For any State desiring to receive a grant under this part, the State educational agency shall file with the Secretary a plan that is—

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* As amended by the ESSA, Pub. L. No. 114-95, § 1005, 129 Stat. 1820.

(A) developed by the State educational agency with timely and meaningful consultation with the Governor, members of the State legislature and State board of education (if the State has a State board of education), local educational agencies (including those located in rural areas), representatives of Indian tribes located in the State, teachers, principals, other school leaders, charter school leaders (if the State has charter schools), specialized instructional support personnel, paraprofessionals, administrators, other staff, and parents; and

(B) is coordinated with other programs under this chapter, the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Rehabilitation Act of 1973 (20 U.S.C. 701 et seq.),[1] the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.), the Workforce Innovation and Opportunity Act (29 U.S.C. 3101 et seq.), the Head Start Act (42 U.S.C. 9831 et seq.), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. 9858 et seq.),[2] the Education Sciences Reform Act of 2002 (20 U.S.C. 9501 et seq.), the Education[3] Technical Assistance Act of 2002 (20 U.S.C. 9601 et. seq.), the National Assessment of Educational Progress Authorization Act (20 U.S.C. 9621 et seq.), the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 et seq.), and the Adult Ed-

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[1] So in original. Probably should be "(29 U.S.C. 701 et seq.),".

[2] So in original. Probably should be "9857 et seq.),".

[3] So in original. Probably should be "Educational".

ucation and Family Literacy Act (29 U.S.C. 3271 et seq.).

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(b) Challenging academic standards and academic assessments

(1) Challenging State academic standards

(A) In general

Each State, in the plan it files under subsection (a), shall provide an assurance that the State has adopted challenging academic content standards and aligned academic achievement standards (referred to in this chapter as "challenging State academic standards"), which achievement standards shall include not less than 3 levels of achievement, that will be used by the State, its local educational agencies, and its schools to carry out this part. A State shall not be required to submit such challenging State academic standards to the Secretary.

(B) Same standards

Except as provided in subparagraph (E), the standards required by subparagraph (A) shall—

(i) apply to all public schools and public school students in the State; and

(ii) with respect to academic achievement standards, include the same knowledge, skills, and levels of achievement expected of all public school students in the State.

(C) Subjects

The State shall have such academic standards for mathematics, reading or language arts, and science, and may have such standards for any other subject determined by the State.

(D) Alignment

(i) In general

Each State shall demonstrate that the challenging State academic standards are aligned with entrance requirements for credit-bearing coursework in the system of public higher education in the State and relevant State career and technical education standards

(ii) Rule of construction

Nothing in this chapter shall be construed to authorize public institutions of higher education to determine the specific challenging State academic standards required under this paragraph.

(E) Alternate academic achievement standards for students with the most significant cognitive disabilities

(i) In general

The State may, through a documented and validated standards-setting process, adopt alternate academic achievement standards for students with the most significant cognitive disabilities, provided those standards—

(I) are aligned with the challenging State academic content standards under subparagraph (A);

(II) promote access to the general education curriculum, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.);

(III) reflect professional judgment as to the highest possible standards achievable by such students;

(IV) are designated in the individualized education program developed under section 614(d)(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(3)) for each such student as the academic achievement standards that will be used for the student; and

(V) are aligned to ensure that a student who meets the alternate academic achievement standards is on track to pursue postsecondary education or employment, consistent with the purposes of Public Law 93-112 [29 U.S.C. 701 et seq.], as in effect on July 22, 2014.

(ii) Prohibition on any other alternate or modified academic achievement standards

A State shall not develop, or implement for use under this part, any alternate academic achievement standards for children with disabilities that are not alternate academic achievement standards that meet the requirements of clause (i).

(F) English language proficiency standards

Each State plan shall demonstrate that the State has adopted English language proficiency standards that—

(i) are derived from the 4 recognized domains of speaking, listening, reading, and writing;

(ii) address the different proficiency levels of English learners; and

(iii) are aligned with the challenging State academic standards.

(G) Prohibitions

(i) Standards review or approval

A State shall not be required to submit any standards developed under this subsection to the Secretary for review or approval.

(ii) Federal control

The Secretary shall not have the authority to mandate, direct, control, coerce, or exercise any direction or supervision over any of the challenging State academic standards adopted or implemented by a State.

(H) Existing standards

Nothing in this part shall prohibit a State from revising, consistent with this section, any standards adopted under this part before or after December 10, 2015.

(2) Academic assessments

(A) In general

Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality student academic assessments in mathematics, reading or language arts, and science. The State retains the right to implement such assessments in any other subject chosen by the State.

(B) Requirements

The assessments under subparagraph (A) shall—

(i) except as provided in subparagraph (D), be—

(I) the same academic assessments used to measure the achievement of all public elementary school and secondary school students in the State; and

(II) administered to all public elementary school and secondary school students in the State;

(ii) be aligned with the challenging State academic standards, and provide coherent and timely information about student attainment of such standards and whether the student is performing at the student's grade level;

(iii) be used for purposes for which such assessments are valid and reliable, consistent with relevant, nationally recognized profes-

sional and technical testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information;

(iv) be of adequate technical quality for each purpose required under this chapter and consistent with the requirements of this section, the evidence of which shall be made public, including on the website of the State educational agency;

(v)(I) in the case of mathematics and reading or language arts, be administered—

(aa) in each of grades 3 through 8; and

(bb) at least once in grades 9 through 12;

(II) in the case of science, be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(c)(c) grades 10 through 12; and

(III) in the case of any other subject chosen by the State, be administered at the discretion of the State;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding, which may include

measures of student academic growth and may be partially delivered in the form of portfolios, projects, or extended performance tasks;

(vii) provide for—

(I) the participation in such assessments of all students;

(II) the appropriate accommodations, such as interoperability with, and ability to use, assistive technology, for children with disabilities (as defined in section 602(3) of the Individuals with Disabilities Education Act (20 U.S.C. 1401(3))), including students with the most significant cognitive disabilities, and students with a disability who are provided accommodations under an Act other than the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), necessary to measure the academic achievement of such children relative to the challenging State academic standards or alternate academic achievement standards described in paragraph (1)(E); and

(III) the inclusion of English learners, who shall be assessed in a valid and reliable manner and provided appropriate accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic

content areas, until such students have achieved English language proficiency, as determined under subparagraph (G);

(viii) at the State's discretion—

(I) be administered through a single summative assessment; or

(II) be administered through multiple statewide interim assessments during the course of the academic year that result in a single summative score that provides valid, reliable, and transparent information on student achievement or growth;

(ix) notwithstanding clause (vii)(III), provide for assessments (using tests in English) of reading or language arts of any student who has attended school in the United States (not including the Commonwealth of Puerto Rico) for 3 or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed 2 additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests

(written in English) of reading or language arts;

(x) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii), regarding achievement on such assessments that allow parents, teachers, principals, and other school leaders to understand and address the specific academic needs of students, and that are provided to parents, teachers, and school leaders, as soon as is practicable after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xi) enable results to be disaggregated within each State, local educational agency, and school by—

(I) each major racial and ethnic group;

(II) economically disadvantaged students as compared to students who are not economically disadvantaged;

(III) children with disabilities as compared to children without disabilities;

(IV) English proficiency status;

(V) gender; and

(VI) migrant status,

except that such disaggregation shall not be required in the case of a State, local educational agency, or a school in which the number of students in a subgroup is insufficient to

yield statistically reliable information or the results would reveal personally identifiable information about an individual student;

(xii) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, other school leaders, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items; and

(xiii) be developed, to the extent practicable, using the principles of universal design for learning.

(C) Exception for advanced mathematics in middle school

A State may exempt any 8th grade student from the assessment in mathematics described in subparagraph (B)(v)(I)(aa) if—

(i) such student takes the end-of-course assessment the State typically administers to meet the requirements of subparagraph (B)(v)(I)(bb) in mathematics;

(ii) such student's achievement on such end-of-course assessment is used for purposes of subsection (c)(4)(B)(i), in lieu of such student's achievement on the mathematics assessment required under subparagraph (B)(v)(I)(aa), and such student is counted as

participating in the assessment for purposes of subsection (c)(4)(B)(vi);[4] and

(iii) in high school, such student takes a mathematics assessment pursuant to subparagraph (B)(v)(I)(bb) that—

(I) is any end-of-course assessment or other assessment that is more advanced than the assessment taken by such student under clause (i) of this subparagraph; and

(II) shall be used to measure such student's academic achievement for purposes of subsection (c)(4)(B)(i).

(D) Alternate assessments for students with the most significant cognitive disabilities

(i) Alternate assessments aligned with alternate academic achievement standards

A State may provide for alternate assessments aligned with the challenging State academic standards and alternate academic achievement standards described in paragraph (1)(E) for students with the most significant cognitive disabilities, if the State—

(I) consistent with clause (ii), ensures that, for each subject, the total number of students assessed in such subject using the alternate assessments does not exceed 1 percent of the total number of all students in the State who are assessed in such subject;

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[4] So in original. No subsec. (c)(4)(B)(vi) has been enacted.

(II) ensures that the parents of such students are clearly informed, as part of the process for developing the individualized education program (as defined in section 614(d)(1)(A) of the Individuals with Disabilities Education Act (20 U.S.C. 1414(d)(1)(A)))—

(aa) that their child's academic achievement will be measured based on such alternate standards; and

(bb) how participation in such assessments may delay or otherwise affect the student from completing the requirements for a regular high school diploma;

(III) promotes, consistent with the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the involvement and progress of students with the most significant cognitive disabilities in the general education curriculum;

(IV) describes in the State plan the steps the State has taken to incorporate universal design for learning, to the extent feasible, in alternate assessments;

(V) describes in the State plan that general and special education teachers, and other appropriate staff—

(aa) know how to administer the alternate assessments; and

(bb) make appropriate use of accommodations for students with disabilities on all assessments required under this paragraph;

(VI) develops, disseminates information on, and promotes the use of appropriate accommodations to increase the number of students with significant cognitive disabilities—

(aa) participating in academic instruction and assessments for the grade level in which the student is enrolled; and

(bb) who are tested based on challenging State academic standards for the grade level in which the student is enrolled; and

(VII) does not preclude a student with the most significant cognitive disabilities who takes an alternate assessment based on alternate academic achievement standards from attempting to complete the requirements for a regular high school diploma.

(ii) Special rules

(I) Responsibility under IDEA

Subject to the authority and requirements for the individualized education program team for a child with a disability under section 614(d)(1)(A)(i)(VI)(bb) of the Individuals with Disabilities Education Act

(20 U.S.C. 1414(d)(1)(A)(i)(VI)(bb)), such team, consistent with the guidelines established by the State and required under section 612(a)(16)(C) of such Act (20 U.S.C. 1412(c)(16)(C))[5] and clause (i)(II) of this subparagraph, shall determine when a child with a significant cognitive disability shall participate in an alternate assessment aligned with the alternate academic achievement standards.

(II) Prohibition on local cap

Nothing in this subparagraph shall be construed to permit the Secretary or a State educational agency to impose on any local educational agency a cap on the percentage of students administered an alternate assessment under this subparagraph, except that a local educational agency exceeding the cap applied to the State under clause (i)(I) shall submit information to the State educational agency justifying the need to exceed such cap.

(III) State support

A State shall provide appropriate oversight, as determined by the State, of any local educational agency that is required to submit information to the State under subclause (II).

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[5] So in original. Probably should be "(20 U.S.C. 1412(a)(16(C))".

(IV) Waiver authority

This subparagraph shall be subject to the waiver authority under section 7861 of this title.

(E) State authority

If a State educational agency provides evidence, which is satisfactory to the Secretary, that neither the State educational agency nor any other State government official, agency, or entity has sufficient authority, under State law, to adopt challenging State academic standards, and academic assessments aligned with such standards, which will be applicable to all students enrolled in the State's public elementary schools and secondary schools, then the State educational agency may meet the requirements of this subsection by—

(i) adopting academic standards and academic assessments that meet the requirements of this subsection, on a statewide basis, and limiting their applicability to students served under this part; or

(ii) adopting and implementing policies that ensure that each local educational agency in the State that receives grants under this part will adopt academic content and student academic achievement standards, and academic assessments aligned with such standards, which—

(I) meet all of the criteria in this subsection and any regulations regarding such

standards and assessments that the Secretary may publish; and

(II) are applicable to all students served by each such local educational agency.

(F) Language assessments

(i) In general

Each State plan shall identify the languages other than English that are present to a significant extent in the participating student population of the State and indicate the languages for which annual student academic assessments are not available and are needed.

(ii) Secretarial assistance

The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible academic assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate academic assessment measures in the needed languages, but shall not mandate a specific academic assessment or mode of instruction.

(G) Assessments of English language proficiency

(i) In general

Each State plan shall demonstrate that local educational agencies in the State will provide for an annual assessment of English proficiency of all English learners in the schools served by the State educational agency.

(ii) Alignment

The assessments described in clause (i) shall be aligned with the State's English language proficiency standards described in paragraph (1)(F).

(H) Locally-selected assessment

(i) In general

Nothing in this paragraph shall be construed to prohibit a local educational agency from administering a locally-selected assessment in lieu of the State-designed academic assessment under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v), if the local educational agency selects a nationally-recognized high school academic assessment that has been approved for use by the State as described in clause (iii) or (iv) of this subparagraph.

(ii) State technical criteria

To allow for State approval of nationally-recognized high school academic assessments that are available for local selection under clause (i), a State educational agency shall establish technical criteria to determine if any such assessment meets the requirements of clause (v).

(iii) State approval

If a State educational agency chooses to make a nationally-recognized high school assessment available for selection by a local educational agency under clause (i), which

has not already been approved under this clause, such State educational agency shall—

(I) conduct a review of the assessment to determine if such assessment meets or exceeds the technical criteria established by the State educational agency under clause (ii);

(II) submit evidence in accordance with subsection (a)(4) that demonstrates such assessment meets the requirements of clause (v); and

(III) after fulfilling the requirements of subclauses (I) and (II), approve such assessment for selection and use by any local educational agency that requests to use such assessment under clause (i).

(iv) Local educational agency option

(I) Local educational agency

If a local educational agency chooses to submit a nationally-recognized high school academic assessment to the State educational agency, subject to the approval process described in subclause (I) and subclause (II) of clause (iii) to determine if such assessment fulfills the requirements of clause (v), the State educational agency may approve the use of such assessment consistent with clause (i).

(II) State educational agency

Upon such approval, the State educational agency shall approve the use of such

assessment in any other local educational agency in the State that subsequently requests to use such assessment without repeating the process described in subclauses (I) and (II) of clause (iii).

(v) Requirements

To receive approval from the State educational agency under clause (iii), a locally-selected assessment shall—

(I) be aligned to the State's academic content standards under paragraph (1), address the depth and breadth of such standards, and be equivalent in its content coverage, difficulty, and quality to the State-designed assessments under this paragraph (and may be more rigorous in its content coverage and difficulty than such State-designed assessments);

(II) provide comparable, valid, and reliable data on academic achievement, as compared to the State-designed assessments, for all students and for each subgroup of students defined in subsection (c)(2), with results expressed in terms consistent with the State's academic achievement standards under paragraph (1), among all local educational agencies within the State;

(III) meet the requirements for the assessments under subparagraph (B) of this paragraph, including technical crite-

ria, except the requirement under clause (i) of such subparagraph; and

(IV) provide unbiased, rational, and consistent differentiation between schools within the State to meet the requirements of subsection (c).

(vi) Parental notification

A local educational agency shall notify the parents of high school students served by the local educational agency—

(I) of its request to the State educational agency for approval to administer a locally-selected assessment; and

(II) upon approval, and at the beginning of each subsequent school year during which the locally selected assessment will be administered, that the local educational agency will be administering a different assessment than the State-designed assessments under subclause (I)(bb) and subclause (II)(cc) of subparagraph (B)(v).

(I) Deferral

A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, for 1 year for each year for which the amount appropriated for grants under part B is less than $369,100,000.

(J) Adaptive assessments

(i) In general

Subject to clause (ii), a State retains the right to develop and administer computer adaptive assessments as the assessments described in this paragraph, provided the computer adaptive assessments meet the requirements of this paragraph, except that—

(I) subparagraph (B)(i) shall not be interpreted to require that all students taking the computer adaptive assessment be administered the same assessment items; and

(II) such assessment—

(aa) shall measure, at a minimum, each student's academic proficiency based on the challenging State academic standards for the student's grade level and growth toward such standards; and

(bb) may measure the student's level of academic proficiency and growth using items above or below the student's grade level, including for use as part of a State's accountability system under subsection (c).

(ii) Students with the most significant cognitive disabilities and English learners

In developing and administering computer adaptive assessments—

(I) as the assessments allowed under subparagraph (D), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (D), except such assessments shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's academic achievement to measure, in the subject being assessed, whether the student is performing at the student's grade level; and

(II) as the assessments required under subparagraph (G), a State shall ensure that such computer adaptive assessments—

(aa) meet the requirements of this paragraph, including subparagraph (G), except such assessment shall not be required to meet the requirements of clause (i)(II); and

(bb) assess the student's language proficiency, which may include growth towards such proficiency, in order to measure the student's acquisition of English.

(K) Rule of construction on parent rights

Nothing in this paragraph shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent's child

participate in the academic assessments under this paragraph.

(L) Limitation on assessment time

Subject to Federal or State requirements related to assessments, evaluations, and accommodations, each State may, at the sole discretion of such State, set a target limit on the aggregate amount of time devoted to the administration of assessments for each grade, expressed as a percentage of annual instructional hours.

(3) Exception for recently arrived English learners

(A) Assessments

With respect to recently arrived English learners who have been enrolled in a school in one of the 50 States in the United States or the District of Columbia for less than 12 months, a State may choose to—

(i) exclude—

(I) such an English learner from one administration of the reading or language arts assessment required under paragraph (2); and

(II) such an English learner's results on any of the assessments required under paragraph (2)(B)(v)(I) or (2)(G) for the first year of the English learner's enrollment in such a school for the purposes of the State-determined accountability system under subsection (c); or

(ii)(I) assess, and report the performance of, such an English learner on the reading or language arts and mathematics assessments required under paragraph (2)(B)(v)(I) in each year of the student's enrollment in such a school; and

(II) for the purposes of the State-determined accountability system—

(aa) for the first year of the student's enrollment in such a school, exclude the results on the assessments described in subclause (I);

(bb) include a measure of student growth on the assessments described in subclause (I) in the second year of the student's enrollment in such a school; and

(cc) include proficiency on the assessments described in subclause (I) in the third year of the student's enrollment in such a school, and each succeeding year of such enrollment.

(B) English learner subgroup

With respect to a student previously identified as an English learner and for not more than 4 years after the student ceases to be identified as an English learner, a State may include the results of the student's assessments under paragraph (2)(B)(v)(I) within the English learner subgroup of the subgroups of students (as defined in subsection (c)(2)(D)) for the purposes of the State-determined accountability system.

* * * * *

8. 34 C.F.R. 200.1 provides in pertinent part:

State responsibilities for developing challenging academic standards.

(a) *Academic standards in general.* A State must develop challenging academic content and student academic achievement standards that will be used by the State, its local educational agencies (LEAs), and its schools to carry out subpart A of this part. These academic standards must—

(1) Be the same academic content and academic achievement standards that the State applies to all public schools and public school students in the State, including the public schools and public school students served under subpart A of this part, except as provided in paragraphs (d) and (e) of this section, which apply only to the State's academic achievement standards;

(2) Include the same knowledge and skills expected of all students and the same levels of achievement expected of all students, except as provided in paragraphs (d) and (e) of this section; and

(3) Include at least mathematics, reading/language arts, and, beginning in the 2005-2006 school year, science, and may include other subjects determined by the State.

(b) *Academic content standards.* (1) The challenging academic content standards required under paragraph (a) of this section must—

(i) Specify what all students are expected to know and be able to do;

(ii) Contain coherent and rigorous content; and

(iii) Encourage the teaching of advanced skills.

(2) A State's academic content standards may—

(i) Be grade specific; or,

(ii) Cover more than one grade if grade-level content expectations are provided for each of grades 3 through 8.

(3) At the high school level, the academic content standards must define the knowledge and skills that all high school students are expected to know and be able to do in at least reading/language arts, mathematics, and, beginning in the 2005-06 school year, science, irrespective of course titles or years completed.

(c) *Academic achievement standards.* (1) The challenging student academic achievement standards required under paragraph (a) of this section must—

(i) Be aligned with the State's academic content standards; and

(ii) Include the following components for each content area:

(A) Achievement levels that describe at least—

(1) Two levels of high achievement—proficient and advanced—that determine how well students are mastering the material in the State's academic content standards; and

(2) A third level of achievement—basic—to provide complete information about the progress of lower-

achieving students toward mastering the proficient and advanced levels of achievement.

(B) Descriptions of the competencies associated with each achievement level.

(C) Assessment scores ("cut scores") that differentiate among the achievement levels as specified in paragraph (c)(1)(ii)(A) of this section, and a description of the rationale and procedures used to determine each achievement level.

(2) A State must develop academic achievement standards for every grade and subject assessed, even if the State's academic content standards cover more than one grade.

(3) With respect to academic achievement standards in science, a State must develop—

(i) Achievement levels and descriptions no later than the 2005-06 school year; and

(ii) Assessment scores ("cut scores") after the State has developed its science assessments but no later than the 2007-08 school year.

(d) *Alternate academic achievement standards.* For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented and validated standards-setting process, define alternate academic achievement standards, provided those standards—

(1) Are aligned with the State's academic content standards;

(2) Promote access to the general curriculum; and

(3) Reflect professional judgment of the highest achievement standards possible.

* * * * *

9. 34 C.F.R. 300.39 provides:

Special education.

(a) *General.* (1) *Special education* means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including—

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

(2) *Special education* includes each of the following, if the services otherwise meet the requirements of paragraph (a)(1) of this section—

(i) Speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards;

(ii) Travel training; and

(iii) Vocational education.

(b) *Individual special education terms defined.* The terms in this definition are defined as follows:

(1) *At no cost* means that all specially-designed instruction is provided without charge, but does not

preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

(2) *Physical education* means—

(i) The development of—

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

(3) *Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

(4) *Travel training* means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to—

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

(5) *Vocational education* means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.